Supreme Court of the United States

No. ~~806~~. 56

OCTOBER TERM, ~~1947~~. 1948

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER, SIXTH COMPENSATION DISTRICT, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER,

VS.

SUWANNEE FRUIT & STEAMSHIP COMPANY, A CORPORATION, AND FIDELITY & CASUALTY COMPANY OF NEW YORK.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

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The Respondents will be referred to as such or as the employer and the carrier, and the Petitioner will be referred to as the Commissioner. References to the Record are by number in parentheses.

STATEMENT OF THE CASE.

The Respondents assert that the Commissioner in his brief has not stated the question accurately. The question is best stated in the language of the trial court (R. 10):

> "The sole and narrow question here is whether the present employer, Suwannee, is liable for TOTAL permanent disability, or whether said employer is liable only for the maximum compensation for PARTIAL permanent disability, the remainder to be paid out of the special fund created by Sec. 44 of the Act, 33 U. S. C. A. 944."

Or it may be stated as set forth in the opinion from the Circuit Court of Appeals, Fifth Circuit (R. 21):

> "The sole question with which we are concerned is whether the employer, Suwannee Fruit and Steamship Company, is liable for compensation to its employee, Davis, for permanent total disability, under provisions of the Longshoremen's and Harbor Workers Compensation Act, 33 U. S. C. A., Sec. 908(a), or whether it is liable only for permanent partial disability, with the remainder of the allowed compensation to be paid out of the special fund created by Section 44 of the Act, 33 U. S. C. A. 944."

It has never been disputed by anyone that the employee was industriously totally disabled. The parties disagree as to who is liable for the payment of permanent disability. The employer and carrier contend that by section 908(f) they are relieved from liability for total disability, and only required to provide compensation for permanent partial liability, which compensation has been provided. The Respondents assert that the clear language of Section 8(f) of the Act fixes liability for these payments upon the special fund set up by the Act. Both the District Court and the Circuit Court of Appeals agreed with Re-

spondents' argument. The answer to the question can be found in the specific provision of the Act which we quote for convenience:

> "Injury Increasing Disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury; * * *" (It is provided, however, the employee is paid for permanent total disability but the payments come from the special fund, not from the employer.)

This language read in its ordinary sense can have but one meaning. It is unambiguous and it needs no construction. An intent on the part of Congress is clearly expressed to relieve the employer from liability for a disability which does not arise from an injury by accident in the employment. This intent is irrefutably demonstrated by the report from the Congressional Committee dealing with this particular section. A spokesman at the Congressional hearing in advocating the quoted language, said:

> "The second injury proposition is as much to the advantage of the employer and his interest as it is for the benefit of the employee. It protects that employer who has hired, say a one-eyed worker who goes and loses his other eye and becomes a total disability. The employer without this sort of thing (*i. e.* the exception clause) would have to pay total permanent disability compensation. Then, on the other hand, this also protects the worker with one eye from being denied employment on account of being an extra risk. Now, by simply taking this up in this way it is possible to protect both the employer and to protect the one-eyed employee also * * *" (Book I, House Committee Hearings, before Committee on Immigration, Naturalization and Insular Affairs, Interstate and Foreign Commerce, Irrigation and Reclamation, Judiciary, 1926, Vol. 438).

The Committee dealt with a factual situation identical with that presented to the District Court and to the Fifth Circuit Court of Appeals. The Commissioner's theory is based upon the fallacious assumption that a definition of disability should be read into this section 8(f) where the words "previous disability" and "subsequent injury" are used. Both the District Court and the Circuit Court of Appeals disagreed with this contention for the announced reason that such an interpolation leads to an anomaly and to a construction directly in the teeth of the expressed intention of the meaning before the Committee considering the Act. The purpose of this act was to relieve employers from compensation for disabilities not caused by the employment. To give it the strained construction urged by the Commissioner, is to distort its true sense and meaning.

The Commissioner's argument likewise overlooks the general intent of the Act which is to compensate for injuries caused by industry. Section 902(2) of the Act, 33 U. S. C. A., defines injury as meaning "the accidental injury or death arising out of and in the course of the employment * * *." This clearly indicates that compensation is to be paid only for something that happened in the course of the employment. Congress did not seek to legislate compensation benefits for disability that did not arise out of the employment. If the Commissioner's argument is given force, the employer is required to pay for a disability which did not arise out of the employment. The intent of Congress controls. *U. S. v. Ryan*, 284 U. S. 167, 76 L. Ed. 224.

Authorities Cited by Commission.

Reliance is had by the Commissioner (his brief, page 6) upon *National Homeopathic Hospital Association* v. *Britton*, 147 F. 2d 561, certiorari denied 325 U. S. 857. The trial court was unable to follow the interpretation of that

opinion as adopted by the majority of the court (R. 10). It agreed with the dissenting opinion of Chief Justice Groner. Likewise the Circuit Court of Appeals adopted the reasoning of the dissenting opinion (R. 23). This decision has not been accepted as an authority. The other cases cited on page 6 of the Commissioner's brief likewise do not support his position. The Grays Harbor case does not deal with our question at all, but with the aggravation of a pre-existing disease. That factual situation is utterly different. The Liberty Stevedoring Company case dealt with an injury to a deformed member and not with our problem, the court saying with reference to the issue now presented:

> "This issue was not raised before the Commissioner and cannot be raised for the first time in this suit as it would be considered as having been waived * * *"

It was also stated that section 8(f) had no application. No interpretation of this section was attempted. The Temperance River Company case is no authority because it erroneously assumed that the refusal to grant certiorari in the National Homeopathic Hospital case was an approval of that case. The Wood Preserving Corporation case expressly held that Section 8(f) of the Act was not applicable. "Accordingly, the case is not governed by Section 8(f) of the Act * * *"

New York Cases: At page 10 of the Commissioner's brief, he refers to the applicability of New York decisions. Judge Groner in his dissenting opinion disposed of this argument:

> "I have carefully considered the Board's argument that the view expressed is not sustained by the New York compensation cases under the New York law, and several intermediate court decisions are cited to sustain this assertion. But an examination of these cases

discloses that none of them decides the precise point we have here. Besides, the language of the New York and the Federal Acts discloses marked differences."

Confusion of Aggravation of a Diseased Condition with a Separate Injury: The Commissioner places reliance, through analogy upon cases dealing with aggravation of a pre-existing condition. But there is no such analogy. The aggravation of an existing condition by injury is only compensable if the injury arises out of the employment, then the effect of that injury on the pre-existing condition is compensable. But such cases have never held that compensation is payable because the pre-existing diseased condition did not arise *in industry*. But when the diseased condition is not affected directly by the injury, the diseased condition is not taken into effect. Our case does not present the aggravation of a diseased condition. The diseased condition continues as it was. The impairment the man had continues as it was and the injury for which compensation was paid had no effect upon it. Compare *Kupiak* v. *Briggs Manufacturing Co.*, 286 Mich. 329, 282 N. W. 427; *Houg* v. *Ford Motor Co.*, 288 Mich. 478, 285 N. W. 27.

At page 12 the Commissioner cites cases in which he states compensation has been allowed under similar circumstances, but these decisions do not bear him out. For instance in *Killisnoo Packing Co.* v. *Scott*, 14 F. 2d 86, an interpretation of section 8(f) was not involved. The court was determining whether total disability compensation should be paid. We have no dispute on that. Our dispute is the determination of the payor. In many cases from other states, the Commissioner's theory has been repudiated and, in our opinion, the view he asserts has only the support of a minority. See 24 A. L. R. 1467; 73 A. L. R. 711; 99 A. L. R. 1505; 142 A. L. R. 822; *Lente* v. *Lucci*, (Pa.) 119 Atl. 132, 24 A. L. R. 1462; *Catlett* v. *Chattanooga Handle Co.*, 165 Tenn. 343; 55 S. W. 2d 257; *Cain* v. *Staley Mfg. Co.*,

97 Ind. App. 235, 186 N. E. 265; *Lehman* v. *Shmahl*, 179 Minn. 388, 299 N. W. 553.

CONCLUSION.

The Circuit Court of Appeals for the Fifth Circuit accurately interpreted the Act (R. 22).

> "Section 8(f) of the Act is clear and unambiguous, and therefore needs no construction. When read in its ordinary sense it can have but one meaning. It was clearly intended to restrict the liability of employers to only those employees disabled as a result of accidental injury sustained during their employment. Congress, in passing this section of the Act, intended to relieve industry from compensation for disabilities not caused by it. To give to Section 8(f) of the Act the strained and ingenious construction urged by the Commissioner is but to distort its true sense and meaning. *U. S.* v. *Ryan*, 284 U. S. 167. When we come to use the phrases 'previous disability,' and 'subsequent injury,' in Section 8(f), they should be construed in their plain and ordinary sense, and one which produces a consistent and logical result. To interpolate into this section the defined meaning of those terms from Section 2 alone leads to an anomaly. We can give to this section no reasonable construction which would make an employer liable for *total disability* where a previous injury *was not* received in the course of employment, and yet to make him liable only for *partial disability* where the previous injury *was* received in the course of employment."

For the foregoing reasons, ably stated by the Court, the petition for the writ should be denied.

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